

APPELLATE UPDATE

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
SEPTEMBER, 2009 VOLUME 17, NO. 1

ANNOUNCEMENTS

This is the first issue of *Appellate Update* for this term of court.

On September 24th, the Supreme Court adopted (to be effective October 1, 2009) Ark. R. Civ. P. 26.1 (rules for electronic discovery). A copy of the per curiam order was included in the mailout.

On September 24th, the Supreme Court adopted, effective immediately, amendments to the Rules of the Supreme Court and Court of Appeals, Rules 4-8 and 6-7 and an amendment to Rule 6 of the Rules of Appellate Procedure – Civil. A copy of the per curiam order was included in the mailout.

On September 24th, the Supreme Court published for comment proposed Administrative Order Number 21 addressing electronic filing in the state courts. The comment period runs to November 1, 2009. A copy of the per curiam order was included in the mailout.

CRIMINAL

Keck v. State: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**cross examination**] The trial court did not err in curtailing appellant's cross-examination of the victim. (Phillips, G.; CACR 08-1215; 9-2-09; Henry).

Swaim v. State: **[sufficiency of the evidence; second-degree sexual assault]** There was substantial evidence to support appellant's conviction. **[rape-shield statute]** The trial court did not abuse its discretion when it refused to admit evidence of the victim's prior sexual conduct. (Clawson, C.; CACR 09-143; 9-2-09; Marshall).

Wade v. State: **[suppression of evidence]** The trial court properly denied appellant's motion to suppress evidence that was obtained during a valid traffic stop. (Storey, W.; CACR 08-1313; 9-2-09; Baker).

Williams v. State: **[revocation of suspended imposition of sentence]** The trial court correctly concluded that appellant violated the terms and conditions of his suspended imposition of sentence by possessing and using marijuana, committing aggravated robbery, and failing to make payments on his fees and costs. (Cox, J.; CACR 08-1001; 9-2-09; Hart).

R.F.R. v. State: **[motion to transfer]** Based upon the appellant's age, his prior history of sexual assault, and the fact that he was charged with a violent offense against a person, the Court of Appeals concluded that the trial court did not err in denying appellant's request to transfer his case to the juvenile division. (Erwin, H.; CA 08-1498; 9-9-09; Brown).

Stevenson v. State: **[sufficiency of the evidence; rape]** There was substantial evidence to support appellant's conviction. **[motion for new trial]** Because the trial court lacked authority to grant appellant's motion for a new trial, it was not error for the court to refuse to hold a hearing on the motion. (Hill, V.; CACR 08-1388; 9-9-09; Brown).

Davis v. State: **[sentencing]** The trial court did not abuse its discretion when it ordered appellant to serve his sentences consecutively rather than concurrently. (Cottrell, G.; CACR 08-1515; 9-9-09; Gruber).

Bagley v. State: **[revocation of suspended imposition of sentence]** The trial court correctly concluded that appellant violated the terms and conditions of his suspended imposition of sentence by making repeated offensive contacts with an individual while a "no contact" order was in effect. (Fitzhugh, M.; CACR 08-905; 9-9-09; Pittman).

Hawkins v. State: **[sufficiency of the evidence; robbery]** There was substantial evidence to support appellant's conviction. **[revocation of probation]** Because there was substantial evidence to support appellant's robbery conviction, the revocation of appellant's probation was necessarily proven by a preponderance of the evidence. (Proctor, W.; CACR 09-25; 9-9-09; Vaught).

Holloway v. State: **[sentencing]** The trial court properly enhanced appellant's sentence based upon his status as a habitual offender with two prior violent felonies. (Fogleman, J.; CACR 09-69; 9-16-09; Vaught).

Rasmussen v. State: **[sufficiency of the evidence; first-degree sexual assault]** There was sufficient evidence to support a finding that appellant was a temporary caretaker or that he was in a position of trust over the victim for purposes of his first-degree-sexual-assault conviction. **[suppression of evidence]** The trial court did not err when it declined to suppress pornographic magazines that were found in appellant's house because the magazines were within the scope of the search that was authorized by a warrant. (Hearnsberger, M.; CACR 08-1319; 9-16-09; Pittman).

Lockhart v. State: **[admission of photographs]** The trial court did not abuse its discretion when it admitted a photograph that was needed for the presentation of the State's case. (Piazza, C.; CACR 08-1407; 9-16-09; Hart).

Stigger v. State: **[sufficiency of the evidence; residential burglary; theft of property]** There was substantial evidence to support appellant's convictions. **[jury instructions]** The trial court did not abuse its discretion by refusing to instruct the jury that it could recommend probation. **[sentencing]** The trial court did not abuse its discretion when it ordered appellant to serve his sentences consecutively rather than concurrently. (Chandler, L.; CACR 09-194; 9-16-09; Henry).

Mason v. State: **[motion to suppress]** Because the time reference in the affidavit was sufficient to establish probable cause, the trial court did not err in denying appellant's motion to suppress evidence obtained pursuant to the warrant. **[motion to sever]** The trial court did not abuse its discretion when it refused to sever the charges, which were pending against appellant. **[pedophile exception]** Admission of photographs was permissible pursuant to the pedophile exception to Rule 404 (b) of the Arkansas Rules of Evidence. **[jury instruction]** Appellant was not entitled to a jury instruction on an offense that was not a lesser-included offense of the crime for which he was charged. (Ramey, J.; CACR 09-298; 9-16-09; Brown).

May v. State: **[revocation of probation]** The trial court properly revoked appellant's probation because he violated the terms and conditions of his probation by failing to perform court-ordered community service. (Edwards, R.; CACR 09-148; 9-23-09; Glover).

Heathman v. State: **[sufficiency of the evidence; third-offense driving while intoxicated]** There was substantial evidence to support appellant's conviction. **[admission of evidence]** Where appellant opened the door to the matter by raising the issue, the introduction of otherwise inadmissible evidence in response is considered to be harmless. (Storey, W.; CACR 08-350; 9-23-09; Hart).

Riley v. State: **[sufficiency of the evidence; aggravated robbery]** There was substantial evidence to support appellant's conviction. **[Batson challenge]** The trial court did not err in denying appellant's *Batson* challenge. (Hudson, J.; CACR 08-1250; 9-23-09; Henry).

Robertson v. State: **[suppression of statement; right to counsel]** During the questioning of appellant by law enforcement officials, appellant asked "Do I need a lawyer." After asking about a lawyer, appellant continued the police interview and made statements that she later sought to suppress. The trial court denied appellant's motion to suppress. On appeal, the Supreme Court concluded that because appellant's question to law enforcement regarding her right to counsel was ambiguous and equivocal, the officers were not required to stop questioning appellant. Thus, the trial court did not err in denying appellant's motion to suppress. (Wilson, R.; CR 09-159; 9-24-09; Brown).

Williams v. State: **[Batson challenge]** The trial court did not err in denying appellant's *Batson* challenges. **[Rule 403]** Because evidence regarding additional criminal charges that were pending against appellant was more probative than prejudicial, the trial court did not abuse its discretion in allowing its admission. (Culpepper, D.; CR 08-356; 9-24-09; Danielson).

Maldonado v. State: **[sentencing]** After entering guilty pleas to eight violations of the Arkansas Hot Check Law, appellant was placed on probation for ninety-six months for each count, which pursuant to Arkansas law, was served concurrently. Thereafter, appellant's probation was revoked and he was sentenced to a total of eighty years in prison. On appeal, appellant argued that because his sentences while on probation were served concurrently, his sentences following revocation should also be served concurrently. The Supreme Court rejected appellant's argument and concluded that the sentences that the trial court ordered on each count after revocation were within the parameters authorized by statute for appellant's multiple felony convictions. The Court also noted that whether a sentence is to be served concurrently or consecutively is within the trial court's discretion. (Sims, B.; CR 08-1455; 9-24-09; Gunter).

Pollard v. State: **[jury instructions]** Because a rational basis did not exist for giving a requested jury instruction on a lesser-included offense, the trial court did not abuse its discretion in refusing to give the instruction. **[motion for mistrial]** The trial court did not abuse its discretion in denying appellant's motion for a mistrial, which was based upon a violation of Rule 615 of the Arkansas Rules of Evidence. (Burnett, D.; CR 08-1294; 9-24-09; Wills).

Andrews v. State: **[revocation of suspended imposition of sentence]** The trial court correctly concluded that appellant violated the terms and conditions of his suspended imposition of sentence by committing third-degree domestic battery. (Cox, J.; CACR 09-45; 9-30-09; Robbins).

Jones v. State: **[sufficiency of the evidence; abuse of an adult]** There was substantial evidence to support appellant's conviction. **[motion to relieve counsel]** The trial court did not abuse its discretion

when it denied appellant's counsel's motion to be relieved. (Sims, B.; CACR 08-1124; 9-30-09; Pittman).

Thompson v. State: [**revocation of suspended imposition of sentence**] The trial court correctly concluded that appellant violated the terms and conditions of his suspended imposition of sentence by failing to make regular restitution payments. (Cox, J.; CACR 08-1064; 9-30-09; Hart).

Mooney v. State: [**sufficiency of the evidence; first-degree murder**] There was substantial evidence to support appellant's conviction. [**Rule 615**] Appellant sought to exclude the testimony of several witnesses, who had discussed their testimony in violation of Rule 615 of the Arkansas Rules of Evidence. Rather than excluding the testimony, the trial court allowed appellant's attorney to cross-examine the witnesses on the issue. Thereby, allowing the witnesses' credibility to be challenged. On review, the Court of Appeals concluded that the trial court did not abuse its discretion in choosing a proper alternative to cure the Rule 615 violation. (Honeycutt, P.; CACR 08-1207; 9-30-09; Gladwin).

Gines v. State: [**sufficiency of the evidence; theft of property**] Because the State failed to produce substantial evidence to establish that the property alleged to have been stolen by appellant had a value in excess of \$500 as required for the offense of theft of property, a class C felony, the trial court erred in denying appellant's motion for a directed verdict. (Proctor, W.; CACR 09-48; 9-30-09; Kinard).

Taylor v. State: [**jury instructions**] Because a rational basis did not exist for giving a requested jury instruction on a lesser-included offense, the trial court did not abuse its discretion in refusing to give the instruction. (Fogleman, J.; CACR 08-1501; 9-30-09; Kinard).

Golden v. State: [**Rule 901**] The trial court did not abuse its discretion in denying appellant's request to admit evidence that was not properly authenticated pursuant to Rule 901 of the Arkansas Rules of Evidence. [**motion for new trial**] The trial court did not abuse its discretion in denying appellant's request for a new trial. (Reynolds, D.; CACR 09-80; 9-30-09; Gruber).

Espinoza and Espinoza v. State: [**motion to suppress**] Because the law enforcement official had probable cause to stop and to search the appellants' vehicle, the trial court did not err in denying their motions to suppress the evidence obtained during the search. (Sutterfield, D.; CACR 09-160; 9-30-09; Glover).

Kennedy v. State: [**motion for new trial**] Based upon comments made by the prosecutor during closing arguments, appellant requested a mistrial. The trial court denied appellant's motion and admonished the jury to disregard the prosecutor's statement. On review, the Court of Appeals concluded that the trial court did not abuse its discretion in denying appellant's motion. (Danielson, E.; CACR 09-388; 9-30-09; Henry).

Williams v. State: [**Rule 403**] The trial court did not abuse its discretion in admitting evidence regarding the facts surrounding appellant's arrest. (Proctor, W.; CACR 09-287; 9-30-09; Brown).

*Cases in which the Arkansas Court of Appeals
concluded that there was substantial evidence
to support the appellant's conviction(s):*

Hamilton v. State (violation of a protective order); Keaton, E.; CACR 08-1040; 9-2-09; Pittman.

Webster v. State (domestic battery in the first degree); Proctor, W.; CACR 08-1342; 9-9-09; Baker.

Boyce-Reid v. State (first-degree murder); Jones, B.; CACR 08-1221; 9-9-09; Henry.

Gray v. State (theft of property); Glover, D.; CACR 08-1439; 9-9-09; Kinard.

Mullins v. State (first-degree terroristic threatening); Williams, C.; CACR 08-1415; 9-9-09; Robbins.

Arrigo v. State (prostitution); Langston, J.; CACR 08-1403; 9-9-09; Gladwin.

Green v. State (delivery of cocaine); Pope, S.; CACR 09-155; 9-16-09; Robbins.

Carroll v. State (first-degree murder); Sims, B.; CACR 09-255; 9-23-09; Marshall.

King v. State (aggravated assault); Langston, J.; CACR 08-1503; 9-23-09; Gladwin.

Woodson v. State (commercial burglary; arson of property worth at least \$100,000; misdemeanor theft of property); Erwin, H.; CACR 08-1491; 9-23-09; Gladwin.

Beasley v. State (theft-by-receiving stolen property worth at least \$2,500) Humphrey, M.; CACR 09-67; 9-30-09; Robbins.

Banks v. State (robbery) Sims, B.; CACR 09-131; 9-30-09; Gruber.

Hawthorne v. State (possession of a controlled substance with intent to deliver; simultaneous possession of drugs and firearms); Wright, J.; CACR 09-154; 9-30-09; Glover.

CIVIL

Burdick v. Little Switzerland Realty, Inc. **[peremptory challenges]** Party made no assertion that any of the jurors actually empaneled were objectionable; nor did she identify any juror that she would liked to have removed. Any error was harmless and without prejudice. (Humphrey, M.; CA 08-1445; 9-2-09; Robbins)

*Hanna v. Hanna:***[trusts]** Trustee's actions in encumbering trust assets were in the best interest of the trusts under the exceptional circumstances presented. (Gunn, M.; CA 08-1256; 9-9-09; Gruber)

Orr v. Orr: **[easements]** Evidence did not support claim for a prescriptive easement because the element of adverse use is missing. Similarly, there was no easement by implication because the place where the easement is being sought currently has no road. Thus, the easement is not apparent, obvious, nor permanent. Finally, there was no easement by necessity because there were alternative routes available. Any easement would be for convenience rather than necessity. (Williams, C.; CA 08-1366; 9-9-09; Henry)

Ellis v. State Farm Bank: **[summary judgment]** Summary judgment was not appropriate because of remaining questions of fact. (Wood, R.; CA 09-118; 9-9-09; Gladwin)

Hearne v. Banks: **[deed]** Deed was not delivered in grantor's lifetime; therefore, conveyance fails for lack of delivery. Deed was procured by fraud. (Fitzhugh, M.; CA 08-922; 9-16-09; Robbins)

Flow Doc, Inc. v. Horton: **[class action]** Court properly certified class on unjust enrichment claim. Appeal on Deceptive Trade Practice claim was moot. (Gray, A.; SC 09-13; 9-17-09; Danielson)

Weiss v. Bryce Co. **[state taxation]** An item, stickyback tape, used in printing process constituted "equipment" and was exempt from sales tax pursuant to section 26-52-402. It was used directly in the manufacturing or processing operation. (Mills, W.; SC 09-225; 9-17-09; Wills)

Brown v. Stephens: **[boundary by acquiescence]** Fence was in place for over 80 years and was recognized by the property owners over the years; consequently, evidence supported finding of a boundary by acquiescence. (Mill, W.; CA 09-115; 9-23-09; Henry)

Maxey v. Kossover: **[condominium deed]** Replacing plain gutters with covered gutters was both a maintenance item and an alteration/improvement under the deed. Owner who dissented to installing the gutters with covers was liable only for the cost of plain gutters (without the added expense of covers) under the terms of the master deed. (Gunn, M.; CA08-1456; 9-23-09; Marshall)

River Valley Land, Inc. v. Hudson [**lease**] Boundary of leasehold interest was shown by survey; lines on a survey control over maps, plats, or field notes. Award to litigant as prevailing party on a contract claim was proper. Lease was not materially altered when lessor expanded and improved the road. (Brantley, E.; CA 08-854; 9-23-09; Pittman)

Taylor v. Taylor: [**quiet title**] There was no breach of the agreement incorporated into the divorce decree because there was no specific term in which the timber property had to be divided and the parties' conduct was consistent with the terms of the contract that they endeavor to effectuate the division. Moreover, estoppel was established which would have tolled any statute of limitations for filing suit to enforce the agreement. (Guthrie, D.; CA 08-1078; 9-23-09; Gladwin)

Beverly Enterprises, Inc. v. Keaton: [**final order**] Order was not final because the judgment does not adjudicate or dismiss all named defendants or claims. (Guthrie, D.; SC 08-834; 9-24-09; Imber)

Howard v. Adams: [**legal mal/sum jud**] Factual issues preclude the entry of summary judgment. (Duncan, X.; CA 08-1190; 9-30-09; Hart)

DOMESTIC RELATION

Young v. Young: [**appellate jurisdiction**] The appeal was dismissed because no final order had been entered dismissing the parties from the court, discharging them from the action, or concluding their rights to the subject matter in controversy. Therefore, the Court of Appeals had no jurisdiction to hear the appeal. (McGowan, M.; No. CA 09-65; 9-2-09; Glover).

Jones v. Jones: [**change of custody**] In this child custody case, the circuit court changed custody from joint custody to "primary joint custody" to the mother with "standard blue book visitation" for the father. The Court of Appeals found the trial court erred in finding that the father failed to establish a material change in circumstances. Discord between the parties making them unable to cooperate in sharing the physical care of the child is a material change in circumstances. Both parties testified that they were no longer able to make joint decisions because they can no longer agree on anything. The trial court also failed to apply the threshold material-change burden to the mother before awarding her primary custody, thereby applying different burdens of proof to each party. The case was reversed and remanded for a custody decision based upon the best interest of the child. The Court of Appeals also noted that a visitation order should be more specific and certain than as stated in this case. (Maggio, M.; No. CA 08-1326; 9-9-09; Robbins).

Painter, et al. v. Kerr: [**grandparent visitation**] The Court of Appeals found no error in the trial court's denial of grandparent visitation and the order was affirmed. (Scott, J.; No. CA 08-656; 9-9-09; Baker).

Rudder v. Hurst: [**temporary support–modification**] The Court of Appeals reviewed the evidence regarding nine issues the appellant raised, found no reversible error, and affirmed the decree in all respects. On one issue, the Court of Appeals found specifically that Ark. Code Ann 9-14-234 does not prohibit the modification of a temporary support order; such orders may be vacated or modified at any time before final judgment is entered. (Switzer, D.; No. CA 08-486; 9-9-09; Henry).

Nordin v. Nordin: [**divorce–property**] The parties' divorce decree ordered the sale at public auction of real property. Appellee advertised the auction in the newspaper. Appellant purchased six tracts at the auction, and a third party purchased a seventh tract. After the auction, appellee filed a motion to set aside the sales, contending that, at the auction, appellant required bidders to have letters of credit, which, if appellee had been told in advance were required, she would have included that information in the advertisement. Before a hearing on the motion, with the approval of the parties, the court entered an order confirming the third-party sale. The court set aside the sale of the six tracts finding "a unilateral change at the time of the previously held auction[,] which made the sale unfair." The Court of Appeals found that the trial court properly declined to apply the "doctrine of inconsistent positions" as the appellant proposed. Also, the trial court did not find whether the sale was "grossly inadequate so as to shock the conscience" of the court because the appellant failed to obtain a ruling on the issue. The decision of the trial court was affirmed. (McCain, G.; No. CA 08-1514; 9-9-09; Hart).

Raspberry v. Raspberry: **[child custody; nonmarital property]** The trial court's decision awarding custody to the mother was not against the preponderance of the evidence. That court was in the best position to evaluate the parties and to view their demeanor. The court heard all the evidence and set forth a detailed and thoughtful analysis for its decision. On the issue of awarding the parties' residence to the wife, undisputedly purchased by the wife before the marriage, the husband submitted no evidence regarding his contributions to the nonmarital real property. Therefore, the trial court did not err in awarding him no financial benefit from the residence. (Benton, W.; No. CA 09-49; 9-16-09; Glover).

Whitehead v. Whitehead: **[child custody; property division]** The Court of Appeals affirmed the trial court in awarding custody of the parties' son to the appellee mother. On the issue of the division of nonmarital and marital property, the Court of Appeals reversed and remanded for the circuit court to articulate whether the four-wheeler is marital or nonmarital property and, if nonmarital, to explain in writing why it was not returned to the appellant, who brought it into the marriage. With respect to the parties' stimulus check, which was marital property, the trial court must recite in its order its basis and reasons for making an unequal division of that marital property. (Vittitow, R.; No. CA 08-1507; 9-16-09; Gruber).

Howard v. Howard: **[civil procedure—Rule 60]** The appellant sought to reopen the parties' divorce case in order to divide appellee's V.A. disability back pay, which he had applied for before the divorce but received after the divorce decree was entered. The trial court denied appellant's motion to reopen and the Court of Appeals affirmed, finding no abuse of the trial court's discretion. The trial court found that the benefits at issue had been applied for before the divorce was entered and that the asset could have been discovered and litigated during the divorce; therefore, it was not grounds for reopening. (McCormick, D.; No. CA 09-128; 9-16-09; Kinard).

Waller v. Waller: **[civil procedure; Rule 59 & Rule 4; motion to reconsider—jurisdiction]** The trial court had no jurisdiction to rule on a motion for reconsideration after thirty days had elapsed. The appeal was dismissed. (Pierce, M.; No. CA 08-1136; 9-16-09; Hart)

Hubanks v. Baughman: **[child support—modification—changed circumstances]** The appellant filed a petition to reduce child support, alleging that her monthly living expenses and child-support payments exceeded her monthly income, which the trial court denied. In affirming, the Court of Appeals said that because the amount of support is based upon the family-support chart, it is presumed reasonable. The appellant had the burden of rebutting the presumption and the burden of establishing a change in circumstances. She failed to do that. Therefore, the trial court did not abuse its discretion in denying her petition to reduce support. (Jamison, L.; No. CA 09-126; 9-16-09; Vaught)

Mitchell v. Bass: **[alimony—modification]** The trial court reduced the appellee's alimony from \$2,100/month to \$1,000/month. The Court of Appeals reviewed the circumstances of both parties and reviewed case law for the rules relating to the award and modification of alimony. On appeal, the appellant urged for the reduction in alimony and, instead, to terminate alimony. On cross appeal, the appellee asked that the alimony not be reduced, but to consider imputing appellant's previous income, to consider his other sources of income, and to consider the fact that she earns far less than he does. The Court of Appeals found that the trial court did not abuse its discretion in reducing the alimony. (Carson, G.; No. CA 08-1423; 9-30-09; Brown).

Evans v. Evans: **[divorce; property settlement agreement; QDRO]** The parties' property settlement agreement was incorporated into the divorce decree. It included provisions for dividing the appellee's retirement benefits. After the divorce, appellant continued to receive one-half of appellee's deposits into his Deferred Retirement Option Plan (DROP), which appellee contended was in error. He filed a motion to determine retirement benefits, contending that her interest in his retirement pay was limited to that which had accrued through the date of divorce. The trial court entered an order in appellee's favor, finding that appellant was not entitled to any benefits acquired by appellee after the divorce was entered. On appeal, the appellant argued that the trial court erroneously modified the parties' property settlement agreement, ignoring the plain terms that gave her one-half of his retirement benefits up to the last date of his employment. The Court of Appeals agreed, finding, however, that the trial court did not modify the agreement, but rather interpreted the agreement. But the Court of Appeals said that the trial court erred in its interpretation of the terms of the agreement. The benefits placed into the DROP

account are marital property because they were earned by the appellee during the parties' marriage, even those contributions made after the divorce. (Elmore, B.; No. CA 09-111; 9-30-09; Robbins)

PROBATE

Ferguson v. Ferguson, Executor: **[probate matters; jurisdiction]** Under Amendment 80, the trial court had jurisdiction to hear probate matters in the civil division once the court consolidated appellant's cases from both probate and civil divisions into the present civil case. The Court of Appeals affirmed the circuit court's refusal to order appellee executor to pay appellant's administrative claim for attorney fees, as awarded by a Texas court, and the court's refusal to order the sale of sufficient Arkansas land to pay the judgment. A grant of administration in a foreign state does not embrace the assets of a decedent in Arkansas. Therefore, the foreign state's judgment is entitled to full faith and credit in Arkansas only so far as it concerns property in the foreign state. The foreign judgment is not entitled to full faith and credit or res judicata on matters pertaining to the Arkansas assets of a decedent. The administration of a decedent's estate in another state is wholly independent of an Arkansas estate. (Wright, R.; No. CA 08-1260; 9-2-09; Vaught)

JUVENILE

Heard v. Arkansas Dept. of Human Servs.: **[TPR - ICWA]** Appellant did not challenge the TPR, but DHS failed to meet the notice requirements of the Indian Child Welfare Act (ICWA). ICWA did not apply because it only applies in cases involving an Indian child under 25 U.S.C. §1903(4). In order to qualify, the child or its parent must be a member of an Indian Tribe eligible to receive federal services. 25 U.S.C. § 1903(8). See 73 Fed. Reg. 18553-57 (Apr. 4, 2008); 72 Fed. Reg. 13648-52 (Mar. 22, 2007) for list of eligible tribes. (Isbell, G.; CA 09-504; 9-30-09; Gladwin).

Ridley v. Arkansas Dept. of Human Servs.: **[TPR]** Appellant challenged the TPR finding as to the children's best interest, specifically that returning the children to her held a potential danger for them. She argued that her visitation posed no danger to her children. The Court of Appeals found that the circuit court is not required to find that actual harm would result or to affirmatively identify a potential harm. The court also noted that there was a huge difference between visiting children and being totally responsible for them. (King, K.; CA 09-367; 9-30-09; Vaught).

Friend and Turner v. Arkansas Dept. of Human Servs.: **[TPR]** Although the circuit court found several grounds to terminate, the Court of Appeals based its decision on the ground that the child had been adjudicated dependent-neglected and had been out of the home for more than 12 months and the conditions for removal had not been remedied despite DHS meaningful efforts. The father argued that DHS failed to provide him reunifications services while he was in prison. The court noted that the father was still in prison at the time of the TPR hearing and had not yet corrected the conditions that led to the child's custody and was still unable to provide a stable home in a time frame consistent with the child's developmental needs or within a time frame viewed from the child's perspective. (Cook, V.; CA 09-310; 9-23-09; Kinard).

White v. Arkansas Dept. of Human Servs.: **[TPR]** Appellant argued that DHS failed to comply with the statutory requirements to justify TPR, including failing to file the case plan, failing to provide notice of staffings, and not specifying the problems that caused removal and what steps appellant needed to take to regain her children. Appellant failed to argue that she was prejudiced by DHS' failure and failed to appeal prior adjudication and review orders. The trial court was affirmed on the basis that the children had been adjudicated dependent-neglected and had remained out of the home for more than 12 months and despite efforts by DHS, the conditions that caused removal had not been remedied. Appellant's failure to challenge the court's prior meaningful efforts finding

precludes the court from now reviewing any adverse rulings resulting from those orders. (Cone, J.; CA 09-221; 9-23-09; Glover).

Howell v. Arkansas Dept. of Human Servs.: **[D-N Adjudication]** Circuit Court affirmed in finding that appellant neglected his child by failing to take reasonable actions to protect her when he knew or should have known about the bad conditions of the home of the relatives where he left her. The evidence was overwhelming that her living conditions were deplorable including, the home had no heat, water, or food. The child was hungry, dirty, and in serious need of dental and medial care. (Fox, S.; CA 09-373; 9-23-09; Marshall)

T.C. v. State: **[Delinquency Adjudication]** The trial court did not err in denying appellant's motion to dismiss. There was sufficient evidence that he acted knowingly when he held plastic bags tightly over her face which caused her death. **[Suppression and Counsel Waiver]** The trial court was affirmed in denying appellant's motion to suppress his confession. The court was also affirmed in finding that the juvenile freely, voluntarily and intelligently waived his right to counsel. The juvenile's mother was present and also signed the waiver. The trial court made specific findings as to the time period that the juvenile was off camera proceeding his confession. **[Brady Violation]** There was no Brady violation where appellant was provided both the name and the substance of a witnesses' statement and chose not to speak with him or call him to testify. **[Disposition]** The court did not err in placing the juvenile on probation upon release from DYS. (Keaton, E.; CA 08-1306; 9-23-09; Gladwin).

Collier v. Arkansas Dept. of Human Servs.: **[PPH]** The child was adjudicated dependent-neglected and custody was removed from the father with the goal of reunification. Both parents were ordered to comply with court orders and case plans. The Court of Appeals affirmed the circuit court's permanency planning order transferring custody to the mother and granting supervised visitation with the father. (Cook, V.; CA 09-232; 9-9-09;Vaught).

Bryers v. Arkansas Dept. of Human Servs.: **[TPR]** Appellant challenged the TPR finding as to the child's best interest, specifically that returning the child to him would subject his child to potential harm and in finding grounds existed to terminate his rights. The Court of Appeals found that the circuit court is not required to find that actual harm would result or to affirmatively identify a potential harm. The court noted that the child had been out of the home for 17 months and, although appellant had partially complied with the case plan and court orders, there was no evidence that he had corrected the problems that caused removal. (Zimmerman, S.; CA 09-278; 9-9-09; Baker).

R.F.R. v. State: **[Transfer]** The trial court did not err in denying appellant's request to transfer his case to the juvenile division based upon the appellant's age, his prior history of sexual assault, and the fact that he was charged with a violent offense against a person. (Erwin, H.; CA 08-1498; 9-9-09; Brown).

EIGHTH CIRCUIT

Whisenhunt v. Southwestern Bell Telephone: **[utilities]** In action to determine whether utility or developer must bear costs of relocating utilities to accommodate construction of certain streets within city limits, the district court did not err in concluding developer must bear costs because development is a private commercial development involving no city actors. City's conditions to a permit application's approval does not convert a private development into public works project. (E.D. Ark.; # 08-3542; 7-17-9)

Wright v. AR & MO Railroad Co. [**Federal Employer's Liability Act**] Claim that jury instructions applied different standards to negligence and contributory negligence rejected. District court did not err in allowing railroad to introduce evidence that plaintiff was discharged for misconduct after he opened the door by testifying he had been discharged for reasons related to his injury. District court did not err in admitting evidence concerning absences as it was relevant to credibility. District court did not err in granting summary judgment for railroad on plaintiff's Locomotive Inspection Act claim as the evidence showed the locomotive was not in use at the time plaintiff slipped and fell from its steps. (W.D. Ark.; # 08-2151; 7-29-09)

Hyundai Motor Finance Co. v. McKay Motors: [**contracts**] Hyundai's pre-verdict motions did not specifically demand judgment as a matter of law concerning the exact amount of damages that it sought for defendant's breach of contract, and its post-verdict motion for judgment as a matter of law did not preserve the issue for review. To the extent the court may consider the merits of the claim, the denial of the post-verdict motion concerning the amount of damages did not constitute a manifest injustice. (E. D. Ark.; No: 08-3214; 7-31-09)

Grand River Enterprises Six Na v. Mike Beebe: [**Tobacco litigation**] While the Arkansas statutory framework concerning implementation of the Master Settlement Agreement may have some anticompetitive effect on non-participating manufacturers, plaintiffs failed to show that the Allocable Share Amendment at issue amounted to a per se violation of the Sherman Act Claim or that Master Settlement Agreement created a hybrid restraint of trade in violation of the Sherman Act. State was immune from liability under the doctrine. (W.D. Ark.; # 08-1436; 8-4-09)

McRaven v. McMurrian: [**prisoner/qualified immunity**] It was not reasonable for watch officer to rely on nurse's medical opinion that prisoner did not need hospitalization as the officer knew that the prisoner had consumed a large quantity and variety of drugs, had exhibited signs of extreme intoxication and knew, or reasonably should have known, that the nurse was basing his determination on the mistaken belief prisoner was drunk As a result, the officer was not entitled to qualified immunity

on the claim she was deliberately indifferent to prisoner's medical needs; nor were the shift sergeant and deputies, who possessed similar information, entitled to qualified immunity on the claims. Nurse was not entitled to qualified immunity as there were issues as to whether his conduct was reckless. Deputy who was trained in CPR and aware of prisoner's condition, but who failed to perform it, was not entitled to qualified immunity. (W.D. Ark.; # 08-3543; 8-20-09)

Scobey v. Nucor Steel-Arkansas: [**Family and Medical Leave Act**] Plaintiff did not adequately put his employer on notice that he was in need of FMLA leave, and his claim that the employer interfered with his FMLA rights by demoting him for unexcused absences must fail. (E.D. Ark.; # 08-1192; 8-25-09)

Friends of Lakeview School v. Huckabee: [**school consolidation**] Arkansas "Act 60" regarding school consolidations does not violate plaintiffs' Fourteenth Amendment rights as the law is facially neutral and the State of Arkansas has a legitimate governmental interest in consolidating school districts to achieve economies of scale and other efficiencies, and the classification the Act draws between school districts is rationally related to advancing that interest. (E.D. Ark.; # 08-2161; 8-25-09)